

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

TOMEKA DAWN LASURE,

Plaintiff,

v.

DENIS RICHARD MCDONOUGH,  
Secretary, United States Department  
of Veterans Affairs,

Defendant.

NO. 2:22-CV-0190-TOR

ORDER GRANTING DEFENDANT’S  
MOTION TO DISMISS

BEFORE THE COURT is Defendant’s Motion to Dismiss Complaint. ECF No. 4. This matter was submitted for consideration without oral argument. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, Defendant’s Motion to Dismiss Complaint (ECF No. 4) is **granted**.

**BACKGROUND**

This case concerns discrimination allegations arising out of Plaintiff’s employment with the Department of Veterans Affairs (“VA”) in Walla Walla,

1 Washington. ECF No. 1. Plaintiff, proceeding *pro se*, alleges Defendant violated  
2 The Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964, 42  
3 U.S.C. § 12117. ECF Nos. 1, 8. Plaintiff also asserts claims for slander and libel.  
4 ECF No. 1. October 27, 2022, Defendant filed the present Motion to Dismiss.  
5 ECF No. 4. The parties timely filed their respective response and reply. ECF Nos.  
6 8, 9. The following facts are drawn from Plaintiff’s Complaint, which are accepted  
7 as true for the purposes of the present motion. *Chavez v. United States*, 683 F.3d  
8 1102, 1108 (9th Cir. 2012).

9 Plaintiff is a former VA employee and union president. ECF No. 1. On  
10 April 2, 2014, Defendant provided a “slanderous and libelous report that the  
11 Plaintiff verbally abused a patient” despite receiving a positive 90-Day  
12 Performance Evaluation on April 9, 2014. *Id.* at 6, ¶ 6.

13 In June 2014, Plaintiff did not appear at an Equal Employment Opportunity  
14 Commission (“EEOC”) hearing because Defendant “purposefully did not act in a  
15 timely manner” when Plaintiff requested use of the financial assistance program to  
16 attend. *Id.* at 4, ¶ 1.

17 On August 13, 2014, Defendant purposefully ignored Plaintiff’s request to  
18 attend the Office of Inspector General Criminal Awareness Crime Prevention  
19 training. *Id.*, ¶ 2. Instead, the Chief of Pharmacy, a white male, asked two white  
20

1 males to attend the training, who did not request to attend. *Id.* at 5, ¶ 2. The Chief  
2 of Pharmacy referred to Plaintiff as “Colored”. *Id.*

3 Additionally, Plaintiff also alleges Defendant listed her as Absent Without  
4 Leave (“AWOL”) when she was sick with a disability, and suspended her for five  
5 days as a result. *Id.*, ¶ 3. Plaintiff also alleges Defendant made false accusations  
6 against her as the union representative for setting her own duty time. *Id.*, ¶ 4.

7 On October 31, 2014, Defendant terminated Plaintiff’s employment. *Id.* at  
8 6, ¶ 7. Plaintiff asserts the false accusations were made to terminate her  
9 employment. *Id.* at 5, ¶ 4.

10 On November 12, 2014, Plaintiff applied for Disability Retirement benefits.  
11 *Id.*, ¶ 5. After applying, Defendant submitted a fraudulent “Unacceptable  
12 Performance” appraisal for Plaintiff to the Office of Personnel Management  
13 (“OPM”). *Id.* This false review was based on another employee’s performance.  
14 *Id.*

15 On July 11, 2022, the EEOC provided Plaintiff with a Notice of Right to  
16 Sue. ECF No. 1 at 6, ¶ 7.

## 17 DISCUSSION

### 18 I. Motion to Dismiss Standards

19 A motion to dismiss may be brought for lack of subject matter jurisdiction.  
20 Fed. R. Civ. P. 12(b)(1). “A Rule 12(b)(1) jurisdictional attack may be facial or

1 factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

2 The Court’s review of a facial attack is limited to the allegations in the complaint  
3 whereas the Court “need not presume the truthfulness of the plaintiff’s allegations”  
4 in a factual attack and can consider evidence outside the complaint. *Id.* If the  
5 jurisdictional attack is successful, the Court must dismiss the action. Fed. R. Civ.  
6 12(h)(3). The party invoking the court’s jurisdiction bears the burden of proving  
7 its existence. *Thompson v. McCombe*, 99 F.3d 352, 352 (9th Cir. 1996).

8 A motion to dismiss may also be brought for a plaintiff’s failure to state a  
9 claim. Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion will be denied if the  
10 plaintiff alleges “sufficient factual matter, accepted as true, to ‘state a claim to  
11 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
12 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). While the  
13 plaintiff’s “allegations of material fact are taken as true and construed in the light  
14 most favorable to the plaintiff” the plaintiff cannot rely on “conclusory allegations  
15 of law and unwarranted inferences ... to defeat a motion to dismiss for failure to  
16 state a claim.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996)  
17 (citation and brackets omitted). That is, the plaintiff must provide “more than  
18 labels and conclusions, and a formulaic recitation of the elements.” *Twombly*, 550  
19 U.S. at 555.

1 As an initial matter, as Defendant brings a Rule 12(b)(1) factual attack, the  
2 Court considers Defendant's proffered documents, including documents related to  
3 the EEOC and negotiated grievance proceedings. ECF No. 4 at 3–4.

## 4 **II. Administrative Exhaustion**

5 Title VII requires a plaintiff to exhaust administrative remedies prior to suit  
6 for employment discrimination. 42 U.S.C. § 2000e-16(c). A union-represented  
7 federal employee aggrieved by a discriminatory personnel action may pursue a  
8 claim under the negotiated grievance procedure or the statutory complaint  
9 procedure, but not both. 5 U.S.C. § 7121(d); 29 C.F.R. § 1614.301(a). The  
10 employee can choose one avenue for grieving a “matter” under section 2302(b)(1)  
11 for discrimination – either the negotiated or statutory processes – but not both. 5  
12 U.S.C. § 7121(d); 29 C.F.R. § 1614.301(a). A “matter” refers to the “underlying  
13 action” which includes “the factual basis of the employee’s adverse action.”  
14 *Heimrich v. Dep’t of the Army*, 947 F.3d 574, 580 (9th Cir. 2020). “The employee  
15 ‘shall be deemed to have exercised his [or her] option’ under § 7121(d) when he or  
16 she files the grievance or the EEO complaint, *whichever first occurs.*” *Id.* at 578  
17 (citing 5 U.S.C. § 7121(d)) (emphasis added).

18 Here, Plaintiff’s Collective Bargaining Agreement provided she could file  
19 discrimination claims through the statutory or negotiated grievance procedure, but  
20 not both. ECF No. 5-1 at 3, ¶ 3. On August 19, 2014, while still employed,

1 Plaintiff filed a formal EEO complaint of discrimination. ECF No. 8-3 at 1.  
2 Plaintiff amended her EEO complaint to include two additional events on  
3 November 13, 2014 and again on January 1, 2015 to include one additional event.  
4 *Id.* Plaintiff subsequently challenged her October 2014 termination through the  
5 negotiated grievance procedure based on union animus. *See* ECF Nos. 6-1–6-4.  
6 Plaintiff filed her EEO complaint before the negotiated grievance filing. 5  
7 U.S.C. § 7121(d). However, Plaintiff failed to challenge her termination through  
8 the EEO proceeding despite amending the allegations twice. Therefore, this Court  
9 does not have jurisdiction over the claim that Plaintiff’s termination was  
10 discriminatory. Fed. R. Civ. P. 12(b)(1). However, Plaintiff’s discrimination  
11 claims raised throughout the EEO process not related to her termination are  
12 administratively exhausted at this time. *See* ECF No. 5-2.

13 Defendant contends the Court should alternatively dismiss these “lesser  
14 adverse employment actions” for failure “to plead any request for relief  
15 unconnected to her removal from service” and “clearly identify on what basis or  
16 bases Plaintiff believes she was subjected to discrimination.” ECF No. 4 at 9–10.  
17 Plaintiff’s other claims appear related to the same “matter” as her wrongful  
18 termination claim. Plaintiff’s allegations do not allow the Court to draw  
19 reasonable inferences that Defendant is liable for discriminatory conduct for which  
20 the Court has jurisdiction. *Iqbal*, 556 U.S. at 678. The Court will provide Plaintiff

1 an opportunity to amend her complaint to so plead she is entitled to relief and what  
2 that relief would be. Fed. R. Civ. P. 8. Again, this Court does not have  
3 jurisdiction over the claim that Plaintiff's termination was discriminatory and  
4 injunctive relief is unavailable because Plaintiff no longer works for the agency.

5 As a final matter, Plaintiff's tort claims for libel and slander must be  
6 dismissed for failure to exhaust administrative remedies under the Federal Tort  
7 Claims Act ("FTCA"). 28 U.S.C. § 2675(a). Regardless, the FTCA does not  
8 waive sovereign immunity for these claims. 28 U.S.C. § 2680(h). As a result,  
9 these claims are dismissed with prejudice.

### 10 **III. Opportunity to Amend**

11 Unless it is absolutely clear that amendment would be futile, a *pro se* litigant  
12 must be given the opportunity to amend her complaint to correct any deficiencies.  
13 *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Plaintiff may submit an  
14 amended complaint within **sixty (60) days** of the date of this Order which must  
15 include sufficient facts to establish federal subject-matter jurisdiction and articulate  
16 causes of action. *See Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th  
17 Cir. 1980).

18 Plaintiff's amended complaint shall consist of a **short** and **plain** statement  
19 showing that she is entitled to relief and alleging with specificity:  
20

1 (1) the specific conduct or actions of each Defendant demonstrating how each  
2 caused or personally participated in causing a deprivation of Plaintiff's  
3 rights; and

4 (2) the specific protected rights of which Plaintiff was deprived.

5 Further, Plaintiff shall set forth her factual allegations in separate numbered  
6 paragraphs. THIS AMENDED COMPLAINT WILL OPERATE AS A  
7 COMPLETE SUBSTITUTE FOR (RATHER THAN A MERE SUPPLEMENT  
8 TO) THE COMPLAINT. The amended complaint must be legibly rewritten or  
9 retyped in its entirety; it should be an original and not a copy; it may not  
10 incorporate any part of the complaint by reference; and IT MUST BE CLEARLY  
11 LABELED THE "AMENDED COMPLAINT" and case number 2:22-CV-0190-  
12 TOR must be written in the caption. PLAINTIFF IS CAUTIONED IF SHE  
13 FAILS TO FILE WITHIN 60 DAYS AS DIRECTED, THE CASE WILL BE  
14 DISMISSED IN ITS ENTIRETY.

15 **ACCORDINGLY, IT IS HEREBY ORDERED:**

16 1. Defendant's Motion to Dismiss Complaint (ECF No. 4) is **GRANTED**.

17 2. Plaintiff's libel, slander, and claims based on wrongful termination are

18 **DISMISSED with prejudice**. Plaintiff's remaining claims are

19 **DISMISSED without prejudice and with LEAVE TO AMEND**.



1 3. Plaintiff may file an Amended Complaint **within sixty (60) days** of the  
2 date of this Order. If Plaintiff fails to file within 60 days as directed, the  
3 case will be dismissed and the Clerk is directed to close the file.

4 The District Court Executive is directed to enter this Order, furnish copies to  
5 counsel, and forward a copy to Plaintiff at the address in the record. The file  
6 remains **OPEN**.

7 DATED December 20, 2022.



10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20

*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge